

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

KEVIN WALKER,	)	1:02-cv-05801-AWI-GSA-PC
	)	
Plaintiff,	)	ORDER GRANTING FEDERAL
	)	DEFENDANTS' MOTION TO DISMISS
vs.	)	(Doc. 108)
	)	
UNITED STATES OF AMERICA, et al.,	)	ORDER DISMISSING DEFENDANTS
	)	USA, CURRIER, LAPPIN, KENDIG,
	)	AND THOMS FROM THIS ACTION
Defendants.	)	
_____	)	

**I. RELEVANT PROCEDURAL HISTORY**

Plaintiff, Kevin Walker ("Plaintiff") is a federal prisoner proceeding pro se with this civil action pursuant to Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), and the Federal Tort Claims Act ("FTCA"). Plaintiff filed the complaint initiating this action on June 25, 2002. Plaintiff names as defendants the United States of America ("USA"), Zachary Currier, Harley Lappin, Newton E. Kendig, Maryellen Thomas<sup>1</sup>, the Geo Group, Inc. (sued as Wackenhut Correctional Corp. ("WCC") and Taft Correctional Institution ("TCI")), Raymond Andrews, Jonathan E. Akanno, Terry Craig, Margaret Minnecci, Esteban Noriega, Geraldine Nichols, Theresa Bucholz, and Suzanne Snellen.

This action now proceeds on the Second Amended Complaint ("SAC") filed August 29, 2005,

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<sup>1</sup>Plaintiff sued defendant as Maryellen Thomas; however, defendants identify her as MaryEllen Thoms. (MTD, Doc. 108-2 at 27:2-7.) The Court shall identify her hereinafter as MaryEllen Thoms.

1 against (1) defendant USA on Plaintiff's FTCA claims; (2) defendants Currier, Lappin, Kendig, and  
2 Thoms ("Bureau of Prisons ('BOP') employees") on Plaintiff's Eighth Amendment claims, (3)  
3 defendants Andrews, Akanno, Craig, Minnecci, Noriega, Nichols, Bucholz, and Snellen ("Taft  
4 employees") on Plaintiff's Eighth Amendment claims, and (4) Taft employees, TCI, and WCC on  
5 Plaintiff's tort claims.<sup>2</sup> (Doc. 72.)

6 On September 8, 2008, Federal Defendants USA, Lappin, Kendig, Thoms, and Currier  
7 ("Defendants") filed a motion to dismiss and/or for summary judgment, pursuant to Rule 12(b)(1), Rule  
8 12(b)(6), and Rule 56. (Doc. 108.) On January 26, 2009, Plaintiff filed an opposition to the motion.  
9 (Doc. 120.) On February 12, 2009, Defendants filed a reply to the opposition. (Doc. 122.) On March  
10 20, 2009, Plaintiff filed a surreply, which was stricken by the Court on April 17, 2009. (Docs. 125, 126.)  
11 On June 23, 2009, the Court issued a Second Informational Order informing Plaintiff of the summary  
12 judgment requirements, and granted Plaintiff leave to file a further opposition to Defendants' motion  
13 to dismiss.<sup>3</sup> (Docs. 127, 128.) On July 27, 2009, Plaintiff filed a further opposition. (Doc. 129.) On  
14 August 3, 2009, Defendants filed a reply to Plaintiff's further opposition. (Doc. 131.) Defendants'  
15 motion to dismiss is now before the Court.

## 16 **II. MOTION BY DEFENDANT USA**

17 Defendant USA brings a motion to dismiss the FTCA claim, based on Plaintiff's failure to  
18 exhaust administrative remedies, and because the decision to transfer Plaintiff to TCI falls within the  
19 discretionary function exception to the FTCA, 28 U.S.C. § 2675.

### 20 **A. Plaintiff's Allegations Against Defendant USA**

21 Plaintiff's action presently proceeds against the USA on a negligence claim brought under the  
22 FTCA, with regard to Plaintiff's allegation that he was transferred by the BOP to a facility that was  
23 constructed by the United States with knowledge that the soil upon which it was built was contaminated  
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25 <sup>2</sup>All other claims were dismissed from this action by the Court on July 7, 2008. (Doc. 90.)

26 <sup>3</sup>Thus, Plaintiff was provided with notice of the requirements for opposing an unenumerated Rule 12(b) motion on  
27 June 23, 2009. Wyatt v. Terhune, 315 F.3d 1108, 1120 n. 14 (9th Cir. 2003).

1 with fungal spores known to cause Valley Fever. Plaintiff alleges that on December 8, 1999, he arrived  
 2 at TCI, a correctional facility owned by the BOP, operated by WCC, and located in the city of Taft, in  
 3 the San Joaquin Valley of California. Plaintiff maintains that San Joaquin Valley soil is known to carry  
 4 coccidioidomycosis fungal spores, which cause Valley Fever. Plaintiff alleges that defendant USA knew  
 5 about the presence of the fungal spores when the prison began accepting federal inmates at TCI in late  
 6 1997, but nothing was done to prevent inmates from being exposed to Valley Fever. Plaintiff maintains  
 7 that dark-skinned persons are more susceptible to the worst cases of Valley Fever, and defendant USA  
 8 transferred Plaintiff, a dark-skinned African-American, to TCI with disregard to his health and safety.  
 9 Plaintiff alleges that as a result of defendant USA's negligence, he contracted Valley Fever. Plaintiff  
 10 requests injunctive relief and monetary damages.

11 **B. FTCA Claim -- Failure to Exhaust**

12 **1. Legal Standards**

13 **a. Rule 12(b)(1)**

14 “Federal courts are courts of limited jurisdiction.” Kokkonen v. Guardian Life Ins. Co., 511 U.S.  
 15 375, 377 (1994). As a result, “[i]t is to be presumed that a cause lies outside this limited jurisdiction,  
 16 and the burden of establishing the contrary rests on the party asserting jurisdiction.” Id. (citations  
 17 omitted). Rule 12(b)(1) of the Federal Rules of Civil Procedure permits dismissal for lack of subject  
 18 matter jurisdiction. In a facial attack, the allegations in Plaintiff’s complaint are taken as true and all  
 19 reasonable inferences are drawn in his favor. Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004).  
 20 Further, the complaint must be construed liberally because Plaintiff is proceeding pro se. Id.

21 **b. FTCA’s Administrative Claim Requirement**

22 “The FTCA is a limited waiver of sovereign immunity, authorizing suit against the United States  
 23 for tortious performance of governmental functions in limited cases,” Bibeau v. Pacific Northwest  
 24 Research Found., Inc., 339 F.3d 942, 945 (9th Cir. 2003), and the waiver “is strictly construed in favor  
 25 of the sovereign . . . ,” FDIC v. Craft, 157 F.3d 697, 707 (9th Cir. 1998). A suit may not be instituted  
 26 against the United States under the FTCA unless the claim is first presented to the appropriate federal  
 27 agency and one of the following conditions is met: the claim is finally denied, or six months have passed

without a final resolution having been made. 28 U.S.C. § 2675(a). The claim presentation requirement is a jurisdictional prerequisite to bringing suit and must be affirmatively alleged in the complaint. Gillispie v. Civiletti, 629 F.2d 637, 640 (9th Cir. 1980). An action filed before the claim has been denied by the appropriate agency is premature and must be dismissed . . . even if the agency ultimately denies the claim before any real progress is made in the lawsuit. McNeil v. United States, 508 U.S. 106, 111-112 (1993). A tort claim against the United States is forever barred unless it is presented in writing to the appropriate Federal agency within two years after the claim accrues, or unless the complaint is filed within six months after the administrative claim is denied. 28 U.S.C. § 2401(b); Dyniewicz v. U.S., 742 F.2d 484, 485 (9th Cir. 1984).

## 2. Motion

Defendant USA moves to dismiss Plaintiff's tort claim brought under the FTCA,<sup>4</sup> on the grounds that Plaintiff failed to exhaust his administrative remedies prior to filing the immediate action on June 25, 2002. Defendant USA states that although Plaintiff filed over thirty-five administrative tort claims, only one of those claims, tort claim TRT-WXR-2003-02678, filed on May 23, 2003, alleged the BOP was negligent for transferring Plaintiff to TCI. Declaration of Maria Syed ("Syed Decl."), Doc. 108-13 at ¶¶3, 6 & Ex. C. The claim was denied on July 10, 2003. Id. at §7 & Ex. D.

Plaintiff filed a verified opposition to defendant USA's motion on January 26, 2009.<sup>5</sup> (Doc. 120.) First, Plaintiff responds that Exhibit H-1 to the SAC shows that he timely filed his tort claim on December 14, 2001, which was denied on December 21, 2001. P's Opp, Doc. 120 at 11 ¶38; SAC at

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<sup>4</sup>As discussed above, the Court dismissed all of Plaintiff's claims against the USA except the negligence claim brought under the FTCA which concerns Plaintiff's allegation that he was transferred by the BOP in 1999 to TCI, a facility that was constructed by the United States with knowledge that the soil upon which it was built was contaminated with fungal spores known to cause Valley Fever.

<sup>5</sup>Defendants argue that Plaintiff's claims in his opposition are not evidence, because his opposition does not include an affidavit. However, the Declaration Under Penalty of Perjury at the end of Plaintiff's Opposition, serves to verify the statements in the Opposition. (Doc. 120 at 33.) Plaintiff's signed declaration, dated January 19, 2009, states "I, Kevin Jessie Walker, verifies (sic) under penalty of perjury pursuant to 28 U.S.C. § 1746(2) that the foregoing is true and correct." Id.

Ex. H-1.<sup>6</sup> In the alternative, Plaintiff argues that he is excused from not exhausting before he filed the lawsuit due to special circumstances and equitable tolling, because he filed administrative remedies as soon as he was able. He states that he was so ill while he was in the hospital that he didn't know where he was; he was not well informed about Valley Fever until December 2001; he was confined in the Security Housing Unit ("SHU"); and the BOP purposely confused him about the administrative remedy process. Id. at 8 ¶25, 11 ¶42, 12 ¶50, 13 ¶ 52; SAC at Ex. H-1. Plaintiff claims that in December 2001, the BOP told him his placement with WCC denied him access to the process, and there was no appropriate channel in BOP policy for filing administrative remedies after his transfer from TCI to FMC Fort Worth. Id. at 12 ¶¶44, 50-51, 13 ¶53; SAC at Ex. H-1. Plaintiff claims that in May 2003, the Executive Assistant at FMC Ft. Worth Dallas Unit told him "he would not answer any of the BP-9's because they were asking for monetary damages," "he would not answer any of the BP-8's as long as money is attached," and told plaintiff "not to file anything else." SAC at 35. Third, Plaintiff maintains that imposing total exhaustion of all claims is not required by the Prison Litigation Reform Act ("PLRA"). P's Opp, Doc. 120 at 12 ¶49. Finally, Plaintiff claims that because he is still being treated for Valley Fever and the damage is still continuing, there is no accrual issue, and the "continuing damages doctrine" applies. Id. at 13 ¶56.

Defendant USA replies that Plaintiff has not disputed that his administrative claim TRT-WXR-2003-02678, filed on May 23, 2003, is the only one that alleged the BOP was negligent in transferring him to TCI in 1999. D's Reply, Doc. 122 at 7:14-16; Syed Decl., Doc. 108-13 ¶6 & Ex. C. The USA also asserts there can be no dispute that the present action was filed on June 25, 2002. D's Reply at 7:16-17. Further, defendant USA argues that Plaintiff's references to the December 2001 administrative claim is irrelevant because the December 2001 claim did not refer to a negligent transfer to TCI in 1999, but rather to medical treatment Plaintiff received at TCI and TCI's failure to prevent Valley Fever. Id. at 7:22-28; Syed Decl ¶4 & Ex. A. With regard to Plaintiff's claim of special circumstances, the USA argues that Plaintiff continues to focus erroneously on the December 2001 claim which is irrelevant to

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<sup>6</sup>Where the pagination on Plaintiff's Opposition differs from the pagination on the Court's electronic record, the Court uses the pagination from the Court's record.

1 whether Plaintiff properly exhausted his administrative remedies prior to bringing his FTCA action. Id.  
2 at 8:2-7. As for equitable tolling, the USA argues that the Ninth Circuit has held that equitable tolling  
3 does not apply to the jurisdictional requirements under the FTCA. Id. at 8:16-19.

4 In his further opposition filed July 27, 2009, Plaintiff discusses his medical services claims and  
5 the public function doctrine, but not the FTCA claims against the USA. Defendants respond that  
6 Plaintiff's further opposition does not raise any arguments germane to the Federal Defendants' motion,  
7 Plaintiff has not stated a claim against the United States with respect to the provision of medical  
8 services, and the "public function" exception does not relate to any claims against the Federal  
9 Defendants.

### 10 3. Discussion

11 There is no evidence that Plaintiff filed any administrative claim with the appropriate agency  
12 concerning his FTCA claim against the USA before he filed the instant lawsuit on June 25, 2002.  
13 Plaintiff's claim at Exhibit H-1 is irrelevant to his argument that he filed a timely FTCA administrative  
14 claim, because that claim, filed on December 14, 2001, does not concern Plaintiff's allegation that he was  
15 negligently transferred to TCI in 1999. Therefore, the Court finds that Plaintiff failed to exhaust  
16 administrative remedies before filing this lawsuit, as required under 28 U.S.C. §2675(a). As a result,  
17 the FTCA claim is premature and must be dismissed.

18 Plaintiff's argument that he should be excused from not exhausting before he filed the lawsuit  
19 because of special circumstances and equitable tolling is without merit. The purpose of equitable tolling  
20 is "to stop a limitations period from continuing to run after it has already begun to run." Scoop-  
21 Gonzalez v. Immigration and Naturalization Serv., 272 F.3d 1176, 1184 (2001) (internal quotations and  
22 citation omitted). Stopping or extending the time period for Plaintiff to exhaust cannot change the fact  
23 that he filed his complaint on June 25, 2002, before exhausting remedies. Plaintiff's term in the SHU  
24 could not have prevented him from exhausting remedies before June 25, 2002, because the SHU term

1 lasted only until August 3, 2001.<sup>7</sup> Evidence that Plaintiff was deathly ill, or that he was not  
2 knowledgeable about his illness, cannot excuse him from exhausting before June 25, 2002, because  
3 Plaintiff acknowledges that by December 2001 he was informed about Valley Fever and filed an  
4 administrative claim regarding his medical care.

5 Plaintiff argues that the BOP purposely confused him about the remedy process in December  
6 2001 and May 2003. In December 2001, Plaintiff was housed at FMC Fort Worth, a BOP facility.  
7 Plaintiff's evidence shows that on December 21, 2001, he was advised by Western Regional Counsel  
8 that his December 14, 2001 claim was denied because claims against individual TCI employees cannot  
9 be considered under the provisions of the Federal Tort Claims Act. Plaintiff was also advised that  
10 "[Agencies of the United States may consider claims for money damages against the United States for  
11 injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission  
12 of any employee of the agency which acting within the scope of his office or employment." SAC at Ex.  
13 H-1. The Court finds no evidence that the BOP intended to confuse Plaintiff by this advice. In fact, such  
14 advice was beneficial to Plaintiff and should have assisted him in filing an appropriate claim. If Plaintiff  
15 was confused, he has not demonstrated that the BOP intended to confuse him. As for the BOP's  
16 interference in May 2003, such conduct, even if true, cannot excuse the fact that Plaintiff filed his  
17 complaint on June 25, 2002, before exhausting remedies.

18 Plaintiff argues that in Jones v. Bock, the Supreme Court held that imposing total exhaustion of  
19 all claims is not required by the PLRA. Jones v. Bock, 549 U.S. 199 (2007). Plaintiff misreads Bock,  
20 in which the Supreme Court held that under the PLRA, "inmates are not required to specially plead or  
21 demonstrate exhaustion *in their complaints*." Id. at 216 (emphasis added). Regardless, Bock is  
22 inapplicable here because Plaintiff's pending claim against the USA was brought under the FTCA, and  
23 exhaustion of FTCA claims is not governed by the PLRA.

24 Plaintiff also claims that because he is still being treated for Valley Fever and the damage is still  
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26 <sup>7</sup> Plaintiff was confined in the SHU from July 27, 2001 until August 3, 2001. P's Opp'n, Doc. 120 at 11 ¶42; SAC  
27 at 6-7 ¶¶32-34, 7-8 ¶37.

continuing, there is no accrual issue, and the “continuing damages doctrine” applies. Plaintiff’s argument appears to be based on the premise that the negligence claim, based on his placement at TCI, will not accrue under the FTCA as long as he continues to suffer injuries caused by Valley Fever or by inadequate medical treatment. The “continuing wrong” doctrine is defined by this Circuit as involving “repeated instances or continuing acts of the same nature, as for instance, repeated acts of sexual harassment or repeated discriminatory employment practices.” Nesovic v. U.S., 71 F.3d 776, 778 (9th Cir. 1995)(quoting Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 558, 597 (9th Cir. ), cert denied, 498 U.S. 824 (1990)). A continuing tort sufficient to toll a statute of limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation. Ward v. Caulk, 650 F.2d 1144, 1147 (9th Cir. 1981) (continuing non-employment resulting from an original action is not a continuing violation). Plaintiff’s argument fails because the alleged negligent act, the decision to place him at TCI, was a single act. Regardless, the date of accrual of the claim is irrelevant to whether Plaintiff exhausted his remedies before filing the lawsuit on June 25, 2002.

Based on the finding that Plaintiff’s FTCA claim against defendant USA is premature and must be dismissed, the Court shall not address defendant USA’s argument that the decision to transfer Plaintiff to TCI falls within the discretionary function exception to the FTCA.

### **C. FTCA Claim - Dismissal With Prejudice**

The USA argues that Plaintiff’s FTCA claim should be dismissed *with prejudice* because his suit is forever barred under 28 U.S.C. § 2401(b) for failure to file suit within six months after denial of the claim. 28 U.S.C. § 2401(b) provides:

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b). The six-month statute of limitations in § 2401(b) is jurisdictional, and failure to file a claim within that time period deprives the federal courts of jurisdiction. Marley v. U.S., 567 F.3d 1030, 1038 (9th Cir. 2009). Accordingly, the doctrines of equitable estoppel and equitable tolling do not apply. Id.



1 Defendant USA presents evidence that since filing the present lawsuit on June 25, 2002, Plaintiff  
2 has proceeded to file in excess of thirty-five administrative tort claims. MTD, Doc. 108-2 at 11:23-24;  
3 Syed Decl., Doc. 108-13 at ¶3. The USA maintains that only one of those claims, tort claim TRT-WXR-  
4 2003-02678, filed May 23, 2003, alleged the BOP was negligent for designating Plaintiff to TCI. MTD  
5 at 11:24-26; Syed Decl. at ¶6 & Exh. C. This claim was denied on July 10, 2003. MTD at 11:26-27;  
6 Syed Decl. at Ex. D. There is no evidence that Plaintiff filed a lawsuit based on this claim after the claim  
7 was denied.

8 As a jurisdictional prerequisite, the FTCA bars claimants from bringing suit in federal court until  
9 they have exhausted their administrative remedies. McNeil v. United States, 508 U.S. 106, 113 (1993).

10 A lawsuit filed prior to the exhaustion of a claimant's administrative claim is premature and must be  
11 dismissed. Id. Pursuant to 28 U.S.C. § 2675(a), an action shall not be instituted upon a claim against  
12 the United States for money damages for an employee's negligence unless the claimant has first  
13 presented the claim to the appropriate Federal agency and his claim was finally denied by the agency in  
14 writing and sent by certified or registered mail. 28 U.S.C. § 2675(a)

15 As "a general rule, a premature "complaint cannot be cured through amendment, but instead,  
16 plaintiff must file a new suit." Duplan v. Harper, 188 F.3d 1195, 1199 (10<sup>th</sup> Cir. 1999) (quoting Sparrow  
17 v. USPS, 825 F.Supp. 252, 255 (E.D.Cal.1993). "Allowing claimants generally to bring suit under the  
18 FTCA before exhausting their administrative remedies and to cure the jurisdictional defect by filing an  
19 amended complaint would render the exhaustion requirement meaningless and impose an unnecessary  
20 burden on the judicial system." Duplan, 188 F.3d at 1199. Numerous District Court have followed  
21 this approach and found that courts lacks subject matter jurisdiction if an action was commenced before  
22 the exhaustion requirement was satisfied, and the action should be dismissed without leave to amend  
23 even if exhaustion has now occurred. See, e.g., Plante v. U.S., 2009 WL 2045692, \*2 (S.D.Cal. 2009);  
24 Soto v. U.S., 2007 WL 2601411, 3 (E.D.Cal. 2007); Gaerman v. F.B.I., 2003 WL 23537963, 2 (D.Or.  
25 2003). Thus, the court must dismiss the claim without leave to amend.

1 Plaintiff offers no valid argument or evidence in opposition to defendant USA's evidence.  
2 Plaintiff's argument that he should be excused because of special circumstances and equitable tolling  
3 fails. In certain circumstances, a late filing of a claim may not be fatal, as a court may employ equitable  
4 doctrines to excuse a claimant's tardiness. Marley, 567 F.3d at 1034. However, the Ninth Circuit has  
5 long held that "the timing requirement contained in § 2401(b) is jurisdictional and is 'subject neither to  
6 estoppel principles nor to equitable considerations.'" Id. (quoting Bert v. V.A. Hospital, 860 F.2d 338,  
7 340 (9th Cir. 1988)). Therefore, equitable doctrines such as special circumstances and equitable tolling  
8 do not excuse Plaintiff's failure to meet the timely filing requirements of § 2401(b).

9 Plaintiff's argument that the BOP interfered with the administrative remedy process in December  
10 2001 and May 2003, even if true, cannot excuse Plaintiff's failure to file a lawsuit after he successfully  
11 completed the administrative process in July 2003.

12 Plaintiff also argues that because he is still being treated for Valley Fever and his injuries are  
13 continuing, there is no accrual issue under § 2401(b), and the "continuing damages doctrine" applies.  
14 As discussed above, a "continuing damages" or "continuing wrong" doctrine is not applicable to  
15 Plaintiff's negligence claim. FTCA claims accrue as a matter of federal law "when a plaintiff knows  
16 that he has been injured and who has inflicted the injury." Winter v. United States, 244 F.3d 1088, 1090  
17 (9th Cir. 2001). The fact that Plaintiff filed his May 23, 2003 FTCA claim proves that Plaintiff knew  
18 in May 2003 that he had contracted Valley Fever and that the USA was at fault. Therefore, Plaintiff's  
19 FTCA claim against the USA accrued on or before May 23, 2003.

20 "Ordinarily, a case dismissed for lack of subject matter jurisdiction should be dismissed without  
21 prejudice so that a plaintiff may reassert his claims in a competent court." Frigard v. United States, 862  
22 F.2d 201, 204 (9th Cir. 1988). However, in Frigard, where the bar of sovereign immunity was absolute,  
23 no court had power to hear it, and plaintiffs could not amend their complaint to avoid the sovereign  
24 immunity bar, the Ninth Circuit found that the district court did not abuse its discretion in dismissing  
25 the action with prejudice. Id. Here, further suit based on plaintiff's FTCA claim is forever barred under  
26 28 U.S.C. § 2401(b), because plaintiff failed to file suit within six months after July 10, 2003, when his  
27 claim was denied. Plaintiff cannot amend the present complaint to avoid the sovereign immunity bar,  
28

1 because amendment will not change the fact the complaint was filed before the claim was denied. See  
2 Fed. R. Civ. P. 15(c). Therefore, the court may properly dismiss the FTCA claims with prejudice.

3 **III. MOTION BY INDIVIDUAL FEDERAL DEFENDANTS**

4 Individual Federal Defendants/BOP employees Harley Lappin, Dr. Newton Kendig, M.D.,  
5 MaryEllen Thoms, and Zachary Currier bring a motion to dismiss and/or for summary judgment with  
6 regard to the Bivens claims against them, because the Court lacks jurisdiction over those claims and they  
7 fail as a matter of law, for the following reasons: First, Plaintiff's allegations against the BOP employees  
8 in their official capacities fail. Second, Plaintiff's claims are all premised on supervisory liability, for  
9 which he fails to state a claim. Third, Plaintiff failed to exhaust administrative remedies before filing  
10 his Bivens claims. Fourth, the BOP employees are entitled to judgment on the Bivens claims because  
11 it is undisputed that they lacked the requisite knowledge to establish deliberate indifference. Fifth, the  
12 Bivens claims fail because each of the BOP employees is entitled to qualified immunity. Finally, with  
13 respect to defendant MaryEllen Thoms, Plaintiff's claim against her should be dismissed for failure to  
14 substitute under Rule 25 of the Federal Rules of Civil Procedure.

15 **A. Plaintiff's Allegations Against Individual Federal Defendants**

16 Plaintiff's action presently proceeds under Bivens against the Individual Federal Defendants/BOP  
17 employees Lappin, Kendig, Thoms, and Currier, for violation of Plaintiff's rights under the Eighth  
18 Amendment, based on Plaintiff's allegations that they failed to provide adequate medical care to Plaintiff.  
19 Plaintiff alleges as follows.

20 On July 17, 2001, Plaintiff reported to sick call complaining of headaches, shortness of breath,  
21 and night sweats. An x-ray of Plaintiff's chest was taken and he was sent back to his unit.

22 On July 18, 2001, Dr. Akanno informed Plaintiff that the x-rays revealed his lungs were nearly  
23 filled to the top with something black. Dr. Akanno prescribed the medications Biaxin and Hytuss and  
24 drew blood for testing of Valley Fever and pneumonia.

25 On July 19, 2001, Dr. Akanno and Nurse Practitioner Snellen changed Plaintiff's medication to  
26 Erythromycin, an antibiotic. When Plaintiff asked if he had a bacterial infection, Akanno said he would  
27 not know until the blood test results were returned.

1 On July 20, 2001, Plaintiff saw Nurse Nichols at the pill window, complained to her about boils  
2 and lesions on his face and body, and told her he was spitting up blood. Nichols told Plaintiff to  
3 continue his medication and gargle with salt water, but he was not examined.

4 On July 25, 2001, Dr. Akanno, Nurse Minnecci, and Nurse Snellen informed Plaintiff the boils  
5 were an allergic reaction to the Erythromycin, but he was not examined and no one cancelled the  
6 medicine.

7 On July 26, 2001, Dr. Akanno prescribed Biaxin again, a medication for viral infections, and  
8 when Plaintiff asked Dr. Akanno if he had a viral infection, the doctor became angry and threw him out.

9 On July 27, 2001, Plaintiff approached BOP Oversight Specialist Currier and asked him if it was  
10 possible to provide the proper medicine for a person if they had an infection in their lungs and it could  
11 be either viral, bacterial, or fungal, without results of a blood test, and Currier said "No."

12 Plaintiff went to the hospital on July 27, 2001 and was called into the examination room with  
13 Dr. Akanno, Nurse Minnecci, and Lt. Bucholz. Plaintiff was examined by Dr. Akanno who advised  
14 Nurse Minnecci he was "cleared." Nurse Minnecci then ordered Lt. Bucholz to take Plaintiff to the SHU  
15 for punishment and for lying to his family and defendant Currier about his medical condition, and he was  
16 taken to the SHU.

17 Warden Andrews, Executive Assistant Craig, Dr. Akanno, Nurse Minnecci, Lt. Bucholz, and  
18 Nurse Snellen wrote a false incident report stating that Plaintiff's medical file showed Dr. Akanno had  
19 diagnosed his illness and Plaintiff was given notification of it. Plaintiff sent word to BOP Oversight  
20 Specialist Currier about the false incident report, but Currier did not respond back. Plaintiff received  
21 no treatment from July 27-30, 2001.

22 On July 30, 2001, the blood test results were returned from the lab, and Dr. Akanno and Lt.  
23 Daughy informed Plaintiff the result was "positive" for coccidioidomycosis and not pneumonia for  
24 which he was being treated.

25 Plaintiff alleges the BOP employees knew or should have known of his condition on July 30,  
26 2001 and should have treated him for Valley Fever. Instead, Plaintiff remained in the SHU sleeping on  
27 the floor without treatment. Plaintiff alleges that the BOP employees delayed his blood test results,  
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1 causing progression of his disease past the lungs, based on their policy to obtain authorization from  
2 WCC headquarters in Florida and BOP authorization from Washington, D.C., before he could be  
3 properly cared for, treated by a specialist, and admitted to a hospital.

4 On August 3, 2001, Plaintiff was taken to see Dr. Mui, an infectious disease specialist, who  
5 diagnosed him again with “disseminated coccidioidomycosis.” Dr. Mui told him the only reason he  
6 hadn’t died was that the disease escaped through his skin, which is very, very rare; the disease usually  
7 returns back to the already filled lungs and causes death.

8 Plaintiff alleges that as a result of the BOP employees’ misconduct, his disease progressed from  
9 his lungs to his blood, and now to “systematic coccidioidomycosis,” affecting his blood, bones, lymph  
10 nodes, and spine, and causing holes in “thoracic, cervical, lumbar, and iliac.” Plaintiff has a hole and  
11 fracture in his left clavicle and requires surgery to remove a large portion of the clavicle joint and breast  
12 plate. Plaintiff suffers from continuous severe headaches, numbness and tingling in his right leg from  
13 damage to his lower spine, and a severe change in the quality of his life. Plaintiff’s liver has enlarged  
14 two to three centimeters and he now risks liver damage. If the disease progresses to Plaintiff’s central  
15 nervous system, research shows a 90% chance of dying within twelve months. Plaintiff suffers from fear  
16 of dying, emotional distress, and pain and suffering. Plaintiff requests injunctive relief and monetary  
17 damages.

18 **B. Bivens Claim - Failure to Exhaust**

19 The Court first addresses the BOP defendants’ argument that Plaintiff failed to exhaust  
20 administrative remedies before filing his Bivens claims. See Perez v. Wisconsin Dep’t of Corr., 182  
21 F.3d 532, 534 (7th Cir. 1999) (vacating judgment and remanding with instructions to dismiss for failure  
22 to exhaust in case where district court granted summary judgment to defendants on the merits and did  
23 not rule on their pending motion for dismissal based on failure to exhaust).

24 **1. Legal Standards**

25 **a. PLRA Exhaustion Requirement**

26 Pursuant to the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with respect  
27 to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any

1 jail, prison, or other correctional facility until such administrative remedies as are available are  
2 exhausted.” 42 U.S.C. § 1997e(a). The exhaustion requirement applies to private prisons. Roles v.  
3 Maddox, 439 F.3d 1016, 1017-18 (9th Cir. 2006). The section 1997e(a) exhaustion requirement applies  
4 to all prisoner suits relating to prison life, including those filed by federal prisoners under Bivens. Porter  
5 v. Nussle, 435 U.S. 516, 532 (2002) (federal prisoners suing under Bivens must first exhaust inmate  
6 grievance procedures; administrative exhaustion is prerequisite even if administrative remedies are not  
7 plain, speedy, and effective, and relief inmate seeks is not available). Prisoners must complete the  
8 prison’s administrative process, regardless of the relief sought by the prisoner and regardless of the relief  
9 offered by the process, as long as the administrative process can provide some sort of relief on the  
10 complaint stated. Booth, 532 U.S. at 741. “Proper exhaustion[, which] demands compliance with an  
11 agency’s deadlines and other critical procedural rules . . .” is required, Woodford v. Ngo, 548 U.S. 81,  
12 90 (2006), and may not be satisfied “by filing an untimely or otherwise procedurally defective . . .  
13 appeal.” Id. at 83-84.

14 The Court takes judicial notice of the fact that the BOP has established an administrative remedy  
15 procedure governing prisoner complaints. The procedure is set forth at 28 C.F.R. § 542.10 et. seq. First,  
16 an inmate must attempt to resolve the issue informally by presenting it to staff. 28 C.F.R. § 542.13  
17 (1999). An informal resolution attempt may be waived in individual cases at the Warden or institution  
18 Administrative Remedy Coordinator's discretion when the inmate demonstrates an acceptable reason for  
19 bypassing informal resolution. Id. If dissatisfied with the response, the prisoner may proceed with the  
20 formal filing of an Administrative Remedy Request (“ARR”). 28 C.F.R. § 542.14 (1999). The deadline  
21 for completion of informal resolution and submission of a formal written ARR, on the appropriate form  
22 (BP-9), is twenty calendar days following the date on which the basis for the ARR occurred. Id. Upon  
23 denial by the institution, the prisoner may appeal the decision by filing a complaint with the Regional  
24 Director of the BOP. 28 C.F.R. § 542.15 (1999). The Regional Director’s decision may be appealed  
25 to the General Counsel in Washington, D.C. Id. Appeal to the General Counsel is the final step in the  
26 administrative remedy process. Id.

27 The Court also takes judicial notice of the fact that TCI has established a two-step institutional  
28

1 remedy process to comply with the Code of Federal Regulations. Step 1 relates to the informal  
2 resolution process set forth in § 542.10. Step 2 corresponds to the initial formal filing of the ARR set  
3 forth in § 542.14. At the conclusion of this process, a prisoner may appeal the decision to the Regional  
4 Director, and then the General Counsel as set forth above. Only after exhausting this process should a  
5 prisoner file an action in the United States District Court.

6 **b. Unenumerated Rule 12(b) Motion**

7 Section 1997e(a) does not impose a pleading requirement, but rather, is an affirmative defense  
8 under which defendants have the burden of raising and proving the absence of exhaustion. Bock, 549  
9 U.S. 199 ; Wyatt, 315 F.3d at 1119. The failure to exhaust nonjudicial administrative remedies that are  
10 not jurisdictional is subject to an unenumerated Rule 12(b) motion, rather than a summary judgment  
11 motion. Wyatt, 315 F.3d at 1119 (citing Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837  
12 F.2d 365, 368 (9th Cir. 1988) (per curiam)). In deciding a motion to dismiss for failure to exhaust  
13 administrative remedies, the court may look beyond the pleadings and decide disputed issues of fact.  
14 Wyatt, 315 F.3d at 1119-20. If the court concludes that the prisoner has failed to exhaust administrative  
15 remedies, the proper remedy is dismissal without prejudice. Id.

16 **2. Motion**

17 Individual Federal Defendants/BOP employees Harley Lappin, Dr. Newton Kendig, M.D.,  
18 MaryEllen Thoms, and Zachary Currier move to dismiss Plaintiff's constitutional tort claims under  
19 Bivens against them based on Plaintiff's failure to exhaust administrative remedies on those claims,  
20 because he failed to submit any written request for resolution while at TCI, and the only request he  
21 submitted regarding medical treatment prior to the lawsuit did not comply with BOP regulations and was  
22 not exhausted. The BOP employees present evidence that in December 2001, Plaintiff filed an ARR  
23 directly with the Western Regional Office relating to his medical treatment at TCI. MTD, Doc. 108-2  
24 at 24:21-22; Declaration of Cecilia Burks ("Burks Decl."), Doc. 108-7 at ¶6. However, Plaintiff failed  
25 to file the request with the local institution, TCI, as mandated under the BOP's regulations. MTD at  
26  
27  
28



24:22-23. Further, the request was not submitted within twenty days of the deprivation of care.<sup>8</sup> MTD at 24:23-25. The BOP employees argue that Plaintiff did not file any remedy requests while at TCI. MTD at 24:19-20; Burks Decl. at ¶5. However, after filing the present action, Plaintiff continued to file administrative claims with respect to the medical care he received at TCI. MTD at 25:2-3. The first wave of requests was filed on April 30, 2003. MTD at 25:3; Burks Decl. at ¶¶8-10. Only three of the twelve requests cited in Plaintiff's SAC, see Doc. 72, ¶52 & Ex. G, were properly filed through the appropriate channels. MTD at 25:4-5; Burks Decl. at ¶¶8-10. However, none of the requests was timely, as they were filed nearly two years after the medical care he received at TCI in 2001 and four years after the transfer there in 1999. MTD at 25:5-7.

Plaintiff argues that he exhausted his remedies because he exhausted some appeals before he filed the SAC. P's Opp'n, Doc. 120 at 12 ¶46. In the verified SAC, Plaintiff states that he exhausted all available administrative remedies regarding his Bivens claims before filing the SAC, by filing administrative remedies 300282, 300284, 300288, 300318, 300328, 300326, 297552, 297558, 256201, 297555, and 300290. SAC, Doc. 72 at 11 ¶52 & Ex. G.

Plaintiff argues that any untimeliness in exhausting his remedies should be excused because he filed administrative remedies as soon as he was able. P's Opp'n, Doc. 120 at 8 ¶25. He claims that he could not file timely requests because he was confined in the SHU, he was so ill that he didn't know where he was, and he was not provided access to the grievance process by the BOP. Plaintiff was confined in the SHU from July 27, 2001 until August 3, 2001. Id. at 11 ¶42; SAC at 6-7 ¶¶32-34, 7-8 ¶37. Plaintiff asserts that when he was transferred from TCI to FMC Ft. Worth for treatment of Valley Fever, he was near death and under immediate treatment, medication, and hospitalization, which made him very ill. P's Opp'n, Doc. 120 at 5-6 ¶14, 8 ¶25. After he became well enough to know where he was, he began the administrative remedy process. Id. at 13 ¶52.

Plaintiff also claims that the BOP purposely confused him about the administrative remedy process by telling him that his placement with WCC denied him access to the process. P's Opp'n, Doc.

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<sup>8</sup>As stated above, the claim against the BOP employees concerns the time period up to August 3, 2001.



1 120 at 9 ¶¶44-47; SAC, Ex. G-1. Plaintiff argues that there is no appropriate channel in BOP policy for  
 2 filing administrative remedies after transfer from a privately-run BOP facility to a BOP-run facility. P's  
 3 Opp'n, Doc. 120 at 12 ¶51. On October 10, 2001, Plaintiff was transferred to FMC Fort Worth, a BOP-  
 4 run facility. When he began filing administrative remedies at FMC Ft. Worth, he was told the BOP  
 5 would not answer his remedies. Id. at 13 ¶52; SAC Ex. G-5. Plaintiff also argues that the BOP should  
 6 not have rejected his appeal #256201-R, filed on December 14, 2001, at the Western Regional Office,  
 7 as not "sensitive."<sup>9</sup> SAC Ex. G-4.

8 Plaintiff also argues that any untimeliness should be excused due to equitable tolling and the  
 9 "continuing claim" doctrine. P's Opp'n, Doc. 120 at 6 ¶15, 8 ¶26. Plaintiff claims he did not know  
 10 whether he could be cured until he acquired materials about Valley Fever in December 2001. Id. at 8  
 11 ¶26.

12 Defendants reply that Plaintiff's argument is not persuasive because the PLRA definitely requires  
 13 proper exhaustion of all administrative remedies prior to filing suit. D's Reply, Doc. 122 at 13:17-21.<sup>10</sup>  
 14 Defendants also argue that "special circumstances" or "equitable tolling" do not apply because Plaintiff  
 15 has demonstrated his proficiency with the BOP's administrative process by filing 216 administrative  
 16 grievances as of August 2008. Id. at 13-14; Burks Decl., Doc. 108-7 at ¶4.

17 In his further opposition filed July 27, 2009, Plaintiff argues that the Bivens and § 1983 claims  
 18 should not be dismissed, because this Court has jurisdiction and Plaintiff has valid claims against  
 19 defendants under the Eighth Amendment through the Fourteenth Amendment because of the Public  
 20 Function Doctrine.

21 Defendants respond that Plaintiff's further opposition does not raise any arguments germane to  
 22 the Federal Defendants' motion, the "public function" exception does not relate to any claims against  
 23 the Federal Defendants, and the only claims against the Individual Federal Defendants are under Bivens.

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25 <sup>9</sup>According to BOP appeal procedures, if the subject matter of an appeal is considered "sensitive," the inmate is  
 26 permitted to bypass the two institutional levels and submit the appeal to the regional level. 28 C.F.R. § 542.14(d)(1).

27 <sup>10</sup>Where the pagination on Defendants' Reply, Doc. 122, differs from the pagination on the Court's electronic record,  
 28 the Court uses the pagination from the Court's record.

1                   **3.     Discussion**

2           Defendants have proven that Plaintiff failed to exhaust his administrative remedies for the Bivens  
3 claims as required by the PLRA. Under BOP and TCI appeal procedures, Plaintiff had twenty days  
4 following the date of the incident to file an ARR at the institutional level. Plaintiff's claims against the  
5 Individual Federal Defendants are based on allegations that BOP employees delayed the results of his  
6 blood test until July 30, 2001 and left him in the SHU without medical treatment from July 30-August  
7 3, 2001. Therefore, Plaintiff's deadline expired at the latest on August 23, 2001. Plaintiff failed to file  
8 any ARR at TCI by August 23, 2001.

9           Plaintiff argues that his confusion with BOP procedures should somehow toll the time for  
10 seeking remedies, but by the time the confusion described by Plaintiff occurred, the twenty-day window  
11 of time had already passed and it was too late to affect his ability to timely seek remedies. Plaintiff also  
12 argues that he was so ill he was unable to file an appeal between August 3, 2002 and August 23, 2001.  
13 However, even if Plaintiff were excused from meeting the 20-day deadline, the evidence demonstrates  
14 that Plaintiff filed his lawsuit before exhausting his remedies, in violation of the PLRA's requirement  
15 to exhaust before filing suit. Plaintiff argues that he filed appeal #25620, regarding his medical care,  
16 on December 14, 2001, before he filed the lawsuit on June 25, 2002. However, appeal #25620 was  
17 never exhausted. It was rejected as procedurally deficient because Plaintiff failed to file a request at the  
18 institutional level. Plaintiff's argument based on the contention that the BOP should not have classified  
19 the appeal as "not sensitive" fails, because proper exhaustion demands compliance with an agency's  
20 critical procedural rules and may not be satisfied by filing a procedurally defective appeal. Plaintiff  
21 failed to comply with the BOP's instruction to file a request or appeal "at the appropriate level via  
22 regular procedures."

23           Plaintiff's argument that he exhausted his remedies by completing the process before he filed the  
24 SAC also fails, because the PLRA requires exhaustion before filing the *lawsuit*, not before filing an  
25 amended complaint. Nor can equitable tolling or the continuing damages doctrine excuse the fact that  
26 Plaintiff filed his lawsuit before exhausting his remedies.

27           Based on the foregoing, Plaintiff has not exhausted the available administrative remedies with  
28

1 regard to the Bivens claims, and the BOP employees are entitled to dismissal of the claims against them  
 2 on this ground. Because of this finding, the Court shall not address the Individual Federal Defendants'  
 3 arguments based on official capacity, supervisory liability, deliberate indifference, qualified immunity,  
 4 and failure to substitute under Rule 25. See Perez, 182 F.3d at 534.

5 **C. Bivens Claim - Dismissal Without Prejudice**

6 The BOP employees argue that Plaintiff's claims against them must be dismissed *with prejudice*,  
 7 because the twenty-day window under 28 C.F.R. § 542.14(a) to file a timely request long ago expired,  
 8 and so has the one year statute of limitations for filing a Bivens claim.

9 The Court finds no authority in this Circuit for the Court to dismiss a case for failure to exhaust  
 10 remedies under the PLRA *with prejudice*, based on Plaintiff's ability under the statute of limitations to  
 11 bring a subsequent action. Failure to exhaust administrative remedies is properly treated as a curable  
 12 defect and should generally result in a dismissal *without prejudice*. City of Oakland, Cal. V. Hotels.com  
 13 LP, 572 F.3d 958, 962 (9th Cir. 2009) (emphasis added). The Ninth Circuit has held that if the court  
 14 concludes that the prisoner has failed to exhaust administrative remedies, the proper remedy is dismissal  
 15 *without prejudice*. Wyatt, 315 F.3d at 1119-20; O'Guinn v. Lovelock Correctional Center, 502 F.3d  
 16 1056, 1059 (9th Cir. 2007) (emphasis added). The discussion about proper exhaustion in Woodford, 548  
 17 U.S. at 93, upon which Defendants rely, does not support Defendants' conclusion that dismissal *with*  
 18 *prejudice* of Plaintiff's Bivens claims is required. In Woodford, the court found that under habeas law,  
 19 a petitioner who has only "technically exhausted" remedies due to missed deadlines is barred from  
 20 asserting those claims in a federal habeas proceeding. Id. Defendants do not explain, and the Court does  
 21 not see, how this finding applies to the case at hand. Therefore, Plaintiff's Bivens claims against the  
 22 BOP employees shall be dismissed without prejudice.

23 **IV. CONCLUSION**

24 Based on the foregoing analysis, IT IS HEREBY ORDERED THAT:

- 25 1. The Federal Defendants' motion to dismiss, filed on September 8, 2008, is granted;
- 26 2. Defendant USA's motion to dismiss Plaintiff's FTCA claims, is granted with prejudice
- 27 based on Plaintiff's failure to exhaust remedies under the FTCA;

3. The Individual Federal Defendants' motion to dismiss Plaintiff's Bivens claims against them is granted without prejudice, based on Plaintiff's failure to exhaust remedies under the PLRA;
4. The Federal Defendants are dismissed from this action; and
5. The Clerk is directed to reflect dismissal of defendants USA, Zachary Currier, Harley Lappin, Newton E. Kendig, and MaryEllen Thoms from this action on the Court's docket.

IT IS SO ORDERED.

**Dated: September 16, 2009**

**/s/ Anthony W. Ishii**

**CHIEF UNITED STATES DISTRICT JUDGE**